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FORUM

The Democracy Obligation According to International Law

A Study of the Dwindling Neutrality of International Law with Respect to Internal Government Structures

FRITHJOF EHM — 22 February, 2016

This post is a reaction to a review which appeared in the journal Law and Politics in Asia, Africa and Latin America (Verfassung und Recht in Übersee, VRÜ).

Representative democracy is the most widespread political system in the world today. At the same time, in a number of countries, democratic institutions and guarantees are subject to erosion with severe consequences for the respective population. This means, for example, that state

authorities are undermining the rule of law and/or basic liberties. This observation applies to all regions of the world and the recent developments in Hungary and Poland have shown that Europe is also not immune. However, there are also promising developments, like in Myanmar, where a parliamentary session in the first democratically elected government in more than 50 years has just begun. Nonetheless, some hopes for democratization have disappointed: so far the Arab Spring – the series of anti-government protests which started about five years ago – has not led to a thorough democratization in the region.

Against this background, it might seem astounding to a number of international lawyers that a democracy obligation should be an existing principle of public international law. Nevertheless, this is precisely the core outcome of my thesis "The Democracy Obligation According to International Law". Pursuant to this, the democracy obligation is part of the law of international conventions and of customary international law. This international legal rule includes the following four demands from states: (1) the holding of regular, free, and competitive elections, (2) the existence of a multi-party system, (3) the guarantee of basic human rights and (4) constitutional legality or rather the presence of a state under the rule of law. The democracy obligation can, inter alia, be derived from international documents (see "International Democracy Documents", edited by *Frithjof Ehm* and *Christian Walter* (Brill | Nijhoff, 2015).

The democracy obligation has both an abstract and a concrete dimension for the state with regard to international law. The abstract dimension is that the people are the only sovereigns and, hence, that there is a commitment to transfer the *sovereignty of the people* – which

is based upon the sovereignty of the individual as the genuine sovereign of international law – to the state as a precondition for the sovereignty of the state. This idea contradicts the classical concept of sovereignty, which allocates sovereignty to each state *a priori* and does not require any transfer of sovereignty. The concrete dimension means for undemocratic states, for example, that the principle of non-intervention guarantees them less protection from external interference. The existence of the democracy obligation also has far-reaching consequences for the international legal order itself. One example is that this new principle plays an important role for the transition of international law towards an international legal system that is constitutionalized and based on values.

To date five reviews of the book "The Democracy Obligation According to International Law" have been published (by Niels Petersen, Patrick Stellbrink, Stefan Kieber, Mehrdad Payandeh and Christian Pippan). They entail very valuable and expected write-ups of the main thesis. Only a few of these points can be addressed in this post. First of all I am aware that many authors perceive it as rather courageous to argue for a democracy obligation.

With regard to a *treaty-based universal democracy obligation* it is certainly true that the evidence could be more complete (*Pippan*, VRÜ 48 (2015), 427). However, in this regard I would like to emphasize the importance of Article 25 ICCPR (participation in public affairs and the right to vote), which "*lies at the core of democratic government based on the consent of the people*" (Human Rights Committee, General Comment 25 (57), para. 1, sentence 3). This should necessarily also comprise the existence of meaningful parliaments, hence an assembly of elected representatives of

a people, which forms the supreme legislative (law-making) authority for that people. The fact that prominent states like China and Saudi Arabia have not yet ratified the Covenant certainly creates a lack of coherence (also, incidentally, for the general human rights system). Nonetheless, this does not question the role of Article 25 ICCPR to be an integral part of the international legal order. Furthermore, a number of authors would at least agree on the existence of a democracy obligation for Europe, the Americas and Africa (e.g., *Pippan*, VRÜ 48 (2015), 427). This convergent treaty-based regional international law also has a corresponding influence on universal international law. Hence it strengthens – to use a metaphor – the thinner universal democracy layer.

Moreover, some reviewers question the existence of a democracy obligation based in customary international law. It is indeed a fact that the pro-democratic practice and *opinio iuris* are not always coherent. Regardless, I would like to stress that no rule of international law has evolved in an entirely straightforward way. Certain contradictions and counter-developments are inevitable. Also in this regard, *Petersen* underlines that pro-democratic developments often advance very slowly today and are accompanied by setbacks (MRM, Heft 1/2013, 60). However, it might also be possible to apply the *persistent objector rule* in certain cases (cf. *Pippan*, VRÜ 48 (2015), 429); presuming the international democracy obligation is a norm of international law in its embryonic stages. This would also require that the respective states consistently and openly object to it. This is often not the case as most states of the world, due to the popularity of democracy, proclaim – strangely enough – to be a democracy. This once more underlines why the whole topic is often so elliptical or ambiguous. Additionally, many

former and recent state practice and *opinio iuris* in favour of a democracy obligation can be counted. This applies first to the several documents of the Inter-Parliamentary Union (IPU) – "the international organisation of the Parliaments of sovereign States" (cf. Article 1 paragraph 1 Statutes of Inter-Parliamentary Union). Besides, it is increasingly argued that the *right to democracy* has become customary international law (e.g. *Monteiro*, Ethics of Human Rights, 2014, p. 341). In this spirit the democracy obligation is simply the other side of the coin, which seeks to give the individual a stronger position in the organisation of the state.

It is clear that the democracy obligation cannot be completely irrelevant for the international community of states. Although "power politics" are a fact for international law, democratic states are somehow "classical partners" when it comes to the further development of international law. This does not mean that the democracy obligation shall lead to a two class society of states (partly misleading *Payandeh*, Der Staat – 2014, 507). A state ruled in conformity with the law has no pressure to justify its international demeanour. The absence of this paradox gives those states more sincerity when it comes to refining the international legal order, which is increasingly based on principles and values.

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ISSN 2510-2567

Tags: *Democracy*

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